

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY E. WASHINGTON

Claimant

VS.

LEARJET INC.

Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. 1,004,880

ORDER

Respondent requested review of the February 16, 2004 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on July 13, 2004.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered work-related bilateral upper extremity injuries. Claimant did not seek a work disability because she returned to a comparable wage job with respondent. Consequently, the nature and extent of claimant's functional impairment was the litigated issue. The Administrative Law Judge (ALJ) adopted the opinion of the court ordered independent medical examiner and awarded claimant benefits for a 13 percent whole body functional impairment.

The respondent requests review of the nature and extent of disability. Respondent notes that claimant had received a functional impairment rating for bilateral upper extremity injuries suffered several years before the injuries which are the subject of this claim. Respondent argues that the current upper extremity impairment rating provided by the treating physician is less than claimant's preexisting impairment rating for her upper extremities and as a result the claimant has suffered no additional disability. In the alternative, respondent argues the claimant has, at most, a 2 percent whole body

functional impairment attributable to her present injuries after deducting her preexisting impairment.

Claimant notes that as a result of her injuries she had surgeries consisting of median nerve decompression at the wrist and de Quervain's release to both her right and left upper extremities. Claimant argues she still has symptoms in both upper extremities and the opinions of her medical expert as well as the court ordered medical examiner more accurately reflect the percentage of impairment not only attributable to her preexisting condition but also the injuries suffered in this claim.

The extent of claimant's functional impairment is the only issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's Award contains a detailed and accurate recitation of the facts contained in the record. It is not necessary to repeat those findings in this Order. The Board adopts those findings as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

The claimant had suffered repetitive trauma upper extremity injuries while working for respondent in 1994. As a result of those injuries claimant required carpal tunnel surgery on her right wrist. On July 27, 1995, Dr. J. Mark Melhorn examined claimant and provided a 10.95 impairment to each upper extremity which he determined resulted in a 14 percent permanent partial whole body functional impairment.¹ The claimant and respondent entered an Agreed Award based upon that 14 percent functional impairment.²

Claimant continued to work for respondent. After Dr. Melhorn released claimant in 1995 until she suffered the injury to her right wrist on January 21, 2002, claimant described the condition in her upper extremities as having good days and bad days but without any severe pain. Claimant noted that if she overused her upper extremities she might have mild pain but it would resolve and go away.

After the right wrist injury on January 21, 2002, the claimant ultimately was referred to Dr. Melhorn for treatment. Conservative treatment failed to alleviate the pain and on

¹ Dr. Melhorn testified that he used both the Third Edition, Revised and the Fourth Edition of the AMA *Guides* to arrive at claimant's percentage of impairment in 1995.

² R.H. Trans., Resp. Ex. 1.

June 11, 2002, Dr. Melhorn performed a median nerve decompression at the right wrist as well as a de Quervain's release. Because claimant favored her left upper extremity while receiving treatment for her right wrist problems she developed problems with her left hand. On October 3, 2002, Dr. Melhorn performed a median nerve decompression at the left wrist as well as a de Quervain's release.

Upon releasing claimant from further treatment, Dr. Melhorn opined claimant had a 5.3 percent impairment to her right and left upper extremities which combined and converted to a 6.4 whole body functional impairment. Dr. Melhorn concluded claimant had suffered no additional permanent impairment as a result of her latest injuries.

At her attorney's request, claimant was examined by Dr. Pedro A. Murati on January 23, 2003. Dr. Murati opined claimant suffered a 3 percent hand impairment for loss of range of motion of the right thumb which converted to a 3 percent impairment to the right upper extremity. For loss of range of motion to the right shoulder a 3 percent impairment to the right upper extremity. For right decompression of the median nerve a 20 percent impairment to the right upper extremity. The right upper extremity impairments combined for a 24 percent impairment to the right upper extremity. Dr. Murati opined claimant had a 10 percent preexisting right upper extremity impairment as a result of her previous right carpal tunnel release. Consequently he deducted that percentage and concluded claimant suffered a 15 percent right upper extremity impairment which converts to a 9 percent whole body functional impairment.

Dr. Murati further opined claimant suffered a 3 percent hand impairment for loss of range of motion of the left thumb which converts to a 3 percent impairment to the left upper extremity. For left decompression of the median nerve a 10 percent impairment to the left upper extremity. The left upper extremity impairments combined for a 13 percent impairment to the left upper extremity which converts to a 8 percent whole body functional impairment. The whole body impairments for each upper extremity combined for a 16 percent whole body impairment.

When questioned why the impairment for the right median compression impairment was 20 percent and the left 10 percent, Dr. Murati noted it was the second surgery on the right and upon examination the claimant had an abnormal first digit Weinstein monofilament test on the right. Although Dr. Murati indicated that he was not aware claimant had a previous impairment to her left upper extremity, he noted that Dr. Melhorn's previous diagnosis of claimant's left upper extremity was simply painful left upper extremity. And without objective findings he would be unable to determine a preexisting left upper extremity impairment.

At the ALJ's request, Dr. C. Reiff Brown examined claimant on June 24, 2003. Dr. Brown concluded claimant suffered a 5 percent impairment to her right upper extremity for loss of shoulder range of motion. In addition the doctor opined claimant suffered an additional 10 percent to each upper extremity due to her carpal tunnel syndrome as well

as an additional 2 percent to each upper extremity due to her deQuervain's tendonitis. The doctor noted the upper extremity impairments would combine and convert to a 16 percent whole body impairment. Dr. Brown further opined that as a result of her previous carpal tunnel surgery claimant had a preexisting 5 percent impairment to her right upper extremity which would convert to a 3 percent whole body impairment. Consequently, Dr. Brown concluded claimant suffered an additional 13 percent whole body functional impairment.

When questioned regarding Dr. Melhorn's preexisting impairment ratings for claimant, Dr. Brown noted that the significant question is not what the ratings were in 1995, but instead what was claimant's condition before her additional injury because the doctor concluded claimant's condition improved after she was released from treatment by Dr. Melhorn in 1995. Dr. Brown further noted that impairment ratings are not exact and a preexisting condition can improve over time.

As previously noted, work disability is not an issue in this case because respondent returned claimant to work after her surgeries earning 90 percent or more of her pre-injury average weekly wage. Accordingly, claimant's entitlement to permanent partial disability benefits is based on claimant's permanent functional impairment as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.³

Drs. Melhorn, Brown and Murtati expressed opinions on claimant's permanent functional impairment. The doctors utilized the AMA *Guides* in determining claimant's functional impairment rating. Dr. Melhorn concluded claimant suffered a 6.4 percent permanent partial whole body functional impairment but that impairment was included in claimant's preexisting impairment. Stated another way, Dr. Melhorn concluded that claimant's injuries did not result in any additional impairment. Dr. Murati concluded claimant suffered a 16 percent permanent partial whole body functional impairment as a result of her injuries. Dr. Brown concluded claimant suffered an additional 13 percent permanent partial whole body functional impairment as a result of her injuries. The ALJ adopted Dr. Brown's 13 percent functional impairment rating.

Initially, respondent argues that claimant has not suffered additional disability because her treating physician, Dr. Melhorn, provided an impairment rating that is less than the doctor had provided for claimant's preexisting impairment to her upper extremities.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

³ K.S.A. 44-510e(a) (Furse 2000).

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁴

And functional impairment is defined by K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the *AMA Guides*, if the condition is addressed by those *Guides*.⁵

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*⁶, the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the

⁴ K.S.A. 44-501(c) (Furse 2000).

⁵ See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001). Copy attached pursuant to Sup. Ct. Rule 7.04.

⁶ *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000). Copy attached pursuant to Sup. Ct. Rule 7.04.

parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury.” 241 Kan. at 593.

The respondent focused on a question to claimant comparing the pain in her hands in 1995 when released from treatment with Dr. Melhorn as compared to the pain in her hands after surgery in 2002. Claimant responded that the pain was not as severe but that she still has some pain. Respondent then argues that this supports the proposition that claimant did not suffer additional disability because her condition improved following the recent surgeries.

But as Dr. Brown noted, the important question to determine preexisting impairment was the level of claimant’s pain immediately before the recent injury. The answer to that question as well as whether claimant received additional treatment and the nature of her activities in the intervening years are all factors to consider in the determination of her preexisting impairment.⁷ It is significant that in the interval between claimant’s release from treatment in 1995 and her injury in 2002, there is no indication that she suffered any significant problems or received additional treatment to her upper extremities. During this time period the claimant continued to perform job activities that required repetitive use of her upper extremities. And when she would occasionally have a recurrence of symptoms in her upper extremities the pain would resolve.

Accordingly, the Board is not persuaded that claimant’s preexisting impairment was greater than the current ratings provided. Both Drs. Murati and Brown determined claimant had preexisting impairment to her right upper extremity and deducted that amount from their final functional impairment rating. The Board is not unmindful that Dr. Melhorn opined that after his surgeries the claimant’s condition was improved. The doctor noted that additional surgeries do not always equate to additional impairment. But Dr. Melhorn agreed that he was unaware of claimant’s condition after he released her in 1995 until she returned for treatment in 2002. And he further agreed that improvement does occur simply with time. Lastly, Dr. Melhorn did not rate claimant’s shoulder pain as the two other doctors did.

The ALJ concluded that Dr. Brown’s rating accurately reflected claimant’s impairment of function after deduction for her preexisting condition. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge John D. Clark dated February 16, 2004, is affirmed.

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898(2001).

IT IS SO ORDERED.

Dated this _____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director